

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TSCHAKA FORTT,	§
	§ No. 439, 2011
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware, in and
	§ for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9801009579
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 7, 2011

Decided: October 31, 2011

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 31st day of October 2011, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Tschaka Fortt, filed an appeal from the Superior Court's July 20, 2011 order denying his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) The record before us reflects that, in October 1999, Fortt was found guilty by a Superior Court jury of two counts of Robbery in the First Degree, one count of Attempted Robbery in the First Degree and three counts of Possession of a Firearm During the Commission of a Felony in connection with a gas station robbery, a bank robbery and another attempted robbery. He was sentenced to a total of 15 years of Level V incarceration, to be followed by Level III probation. This Court affirmed Fortt's convictions on direct appeal.² This Court also affirmed the Superior Court's denials of Fortt's first two postconviction motions.³

(3) In this appeal from the Superior Court's denial of his third postconviction motion, Fortt claims that a) his due process rights were violated because there was insufficient evidence presented at trial to establish that he had a gun during the course of either robbery; b) charging him with two counts of first degree robbery constituted prosecutorial misconduct; and c) his trial and appellate counsel provided ineffective assistance in failing to challenge the sufficiency of the evidence on the

¹ Supr. Ct. R. 25(a).

² *Fortt v. State*, 767 A.2d 799 (Del. 2001).

³ *Fortt v. State*, Del. Supr., No. 574, 2001, Steele, J. (Mar. 22, 2002); *Fortt v. State*, Del. Supr., No. 156, 2002, Walsh, J. (Aug. 8, 2002).

robbery charges. All of Fortt's claims are predicated on his underlying contention that the testimony of the robbery victim was insufficient to establish that he possessed a gun during either the gas station robbery or the bank robbery.

(4) Fortt's current claims are unavailing for several reasons. First, his motion is time-barred pursuant to Rule 61(i)(1). Second, his current claim of insufficiency of the evidence regarding the gas station robbery was presented to this Court on direct appeal and to the Superior Court in a previous postconviction motion, precluding review of the claim pursuant to Rule 61(i)(4). Third, because his claim of insufficiency of the evidence regarding the bank robbery was not presented in his direct appeal or in either of his previous postconviction motions, it is barred pursuant to Rule 61(i)(2). Moreover, in the absence of any evidence that Fortt's constitutional rights were violated, we conclude that neither Rule 61(i)(4)'s "interest of justice" exception nor Rule 61(i)(5)'s "miscarriage of justice" exception overcomes the bars to Fortt's claims.

(5) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice